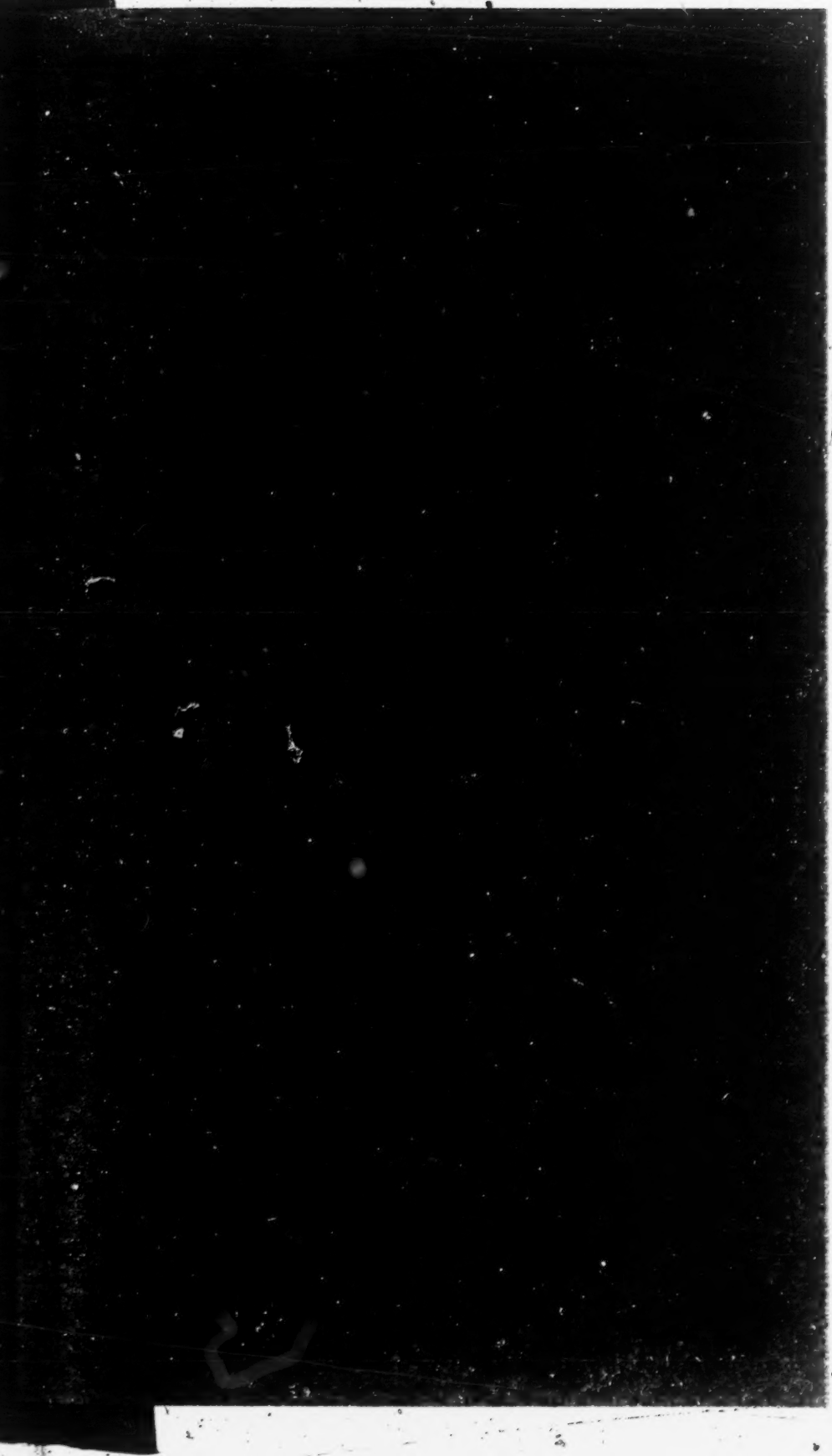

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 30

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, EXECUTORS OF THE ESTATE OF EDWIN B. HENDRIE, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 26–28) is not reported. The opinion of the court below (R. 49–55) is reported in 95 F. (2d) 160.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 31, 1938 (R. 55). A petition

for rehearing was filed by the taxpayer on March 1, 1938 (R. 56), and was denied April 4, 1938 (R. 58). The petition for a writ of certiorari was filed May 2, 1938. (R. 59.) Certiorari was granted May 31, 1938. (R. 59.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there was any evidence to sustain the Board of Tax Appeals in reversing the Commissioner's determination that the decedent's irrevocable transfer, effected by a declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 41–43.

STATEMENT

The facts were stipulated. No witnesses were called before the Board. There was a general stipulation (R. 33–37) of the formal facts, namely (so far as material here), that the decedent died on July 15, 1932, at the age of eighty-five years and six months (R. 33); that on January 7, 1927 (R. 35), he established the trust in question, Exhibit C, attached to the stipulation (R. 9, 37), and,

finally (R. 36), that the decedent had theretofore executed a will, which is also attached to the stipulation, as Exhibit G (R. 44–48).

The transfer in trust provided *inter alia* that the income should be accumulated "during the lifetime of the Donor"; that "after the death of the Donor," so much of the income as the decedent's daughter called for should be distributed to her; that "after the death of the Donor," so much of the income as she should not call for should be added to the principal (R. 11), and that the corpus should be distributed upon her death to the decedent's grandchildren and their descendants (R. 11). The trust further provided as follows (R. 11):

> Third: No title in any part of the trust estate hereby created or in the income accruing therefrom or in its accumulations, shall vest in any beneficiary hereunder during the continuance of the trust as to such beneficiary, and no beneficiary shall have the right or power to transfer, assign, anticipate or encumber his or her interest in said trust estate or the income therefrom prior to the actual distribution thereof by the Trustee to such beneficiary.

The will had been executed January 26, 1925 (R. 47). After making certain relatively small bequests, the decedent had devised and bequeathed the residue of his estate to the petitioners in trust for the benefit of his daughter and grandchildren, and their descendants, upon substantially the same

terms as those of the trust here in question (R. 45–46).

By further separate stipulations, it was stipulated that if certain witnesses were called by the petitioners, they would testify (so far as material here) as follows:

That J. E. Kinney, a physician of Denver, Colorado (R. 37), would testify that he had been the family physician of the decedent over a period of years; was consulted by him on July 11, 1927, at which time the decedent gave him a history of no illness except occasional slight attacks of rheumatism; that his appetite was good; that he slept well and that he had no pains or symptoms of trouble anywhere; that the decedent came to be checked up periodically and that on the date of the examination stated he was eighty years and six months of age and that his physical and mental conditions were much better than the average of persons of his age; that the decedent died on July 15, 1932; that he had never seen any evidence of any disease or abnormal conditions in the decedent until several years after the examination of July 11, 1927; that at no time during his acquaintance with the decedent did he indicate any fear or expectancy of death, but at all times spoke of plans for business activities, trips and other matters connected with his current life, and that the primary cause of death was acute pyelonephritis. (R. 38–39.)

That Frank N. Bancroft, attorney at law, Denver, Colorado (R. 39), would testify that in the fall

of 1926 and in the winter of 1926-27, he was the trust officer of the petitioner Colorado National Bank of Denver (R. 40); that in the latter part of 1926, the decedent had been considering for a considerable period of time how he might best transfer a part of his estate in the interest of his daughter, and her descendants and for her heirs; so that whatever might happen to his own financial affairs in the future, such persons would be provided for; that the decedent had discussed with him the present and future needs of his daughter and her children, the character of securities that he desired to put into the trust, and what sort of provisions should be made to protect these securities and yet provide for his daughter and her children; that the amount which he wished to place in trust constituted about one-third of his then fortune and would be made up of securities of the more stable sort which required the least attention; that several drafts of trust agreements were submitted to the decedent and discussed; that the decedent expressed at many of the meetings between them the thought that after he made this trust agreement, he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in the trust deed and thereby put it entirely beyond his own power otherwise to dispose of the same contrary to the provisions of

the trust deed and to remove it from the vicissitudes of speculations; that the decedent expressed a desire to "play on the market" more actively and in a more speculative way than in the par ; that he often spoke of his intention of thus occupying himself for the rest of his life, giving less time to his business; that the decedent at al times indicated that his thought was how to word the trust agreement so that whatever might happen to him financially in the future and in respect to his remaining fortune, the corpus of the trust would in no wise be jeopardised thereby, nor its disposition in the manner provided for in the trust deed prevented; that during this period the decedent appeared in good health, was actively managing his own affairs and during the discussions mentioned did not indicate he entertained any thought of impending death or that he expected his death within the immediate or reasonably near future, nor did he discuss the problem of avoidance of death or inheritance taxes or any problems as to the disposition of the rest of his fortune. (R. 41–32.)

That W. W. Grant, the son-in-law of the decedent (R. 42), would testify that he knew the decedent intimately through almost daily association since 1910 and was more or less familiar with his business affairs; that he appeared in excellent health and spirits up to within a few months of the date of his death and until the last year of his life spent each winter in California, going and return-

g by himself; that he was in the habit of specu-
ting on a considerable scale, particularly during
st five years of his life, and that one time the
cedent stated to him that his daughter and grand-
ildren would be adequately provided for in the
ent of his death through the medium of a trust
hich he had created, regardless of his operations
the stock exchange; that he first learned of the
st in 1930 when the decedent made the statement
ove mentioned; that up until six months of the
te of his death, the decedent took regular daily
ercise by means of walks, setting up exercises
d occasional games of golf and read market re-
rts and services up until his last illness, all the
e maintaining and expressing a lively interest
the future trend of American business and
arkets. (R. 43–44.)

This constituted all of the evidence in the case.

The Commissioner determined that the transfer
question was made in contemplation of death,
cluded in the gross estate the value of the prop-
ty transferred (R. 8) and accordingly deter-
ined a deficiency in the tax in the sum of $188,-
8.28 (R. 8).

The Board disposed of the case in a memoran-
um opinion (R. 26–28). It made no special find-
gs, but after stating the formal facts as stipu-
ted (R. 26–27), summarized the testimony given
bove (R. 27) and then turned to a discussion of
he legal phases of the case. The Board said that
he petitioners had the burden of proof to show

that the transfer was not made in contemplati
of death; that they recognized this and contend
the evidence showed affirmatively that the do
nant motive in the mind of the donor was c
nected with life, not with death, saying their po
was that he made the transfer so that he wo
be free to speculate on the stock market for
rest of his life without fear that loss of his fort
would leave nothing for his daughter and her c
dren; and that the petitioners pointed out that
decedent made a complete gift and retained
possession or enjoyment in himself. The bo
then mentioned that the Commissioner relied u
the fact that the income was to be accumulated
added to corpus during the life of the decedent
consequently the beneficiaries were to receive n
ing until after his death, saying that the Com
sioner argued from this circumstance that
transfer was a substitute for testamentary disp
tion made in contemplation of death. (R. 27–

After thus stating the contentions of the par
the Board immediately proceeded to a summ
disposition of the case upon the basis of its co
sion as follows (R. 28).:

> We think the transfer was not made in
> templation of death within the meanin
> the statute as explained in *United S*
> v. *Wells*, 283 U. S. 102. Principles
> nounced in the cases above listed control
> case which is not distinguishable from
> or more of those cases where, as here

come was to be accumulated until after the death of the donor.[1] Therefore, on this point we hold for the petitioners.

The court below, in a two to one decision (R. 49-55), disagreed with the conclusion of the Board. The court stated the facts substantially in the terms of the stipulations, just as the Board had done, although its statement is somewhat fuller than that made by the Board. The court reversed the Board's decision because, as it stated, it failed to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute. (R. 55.) The basis for this conclusion is that (R. 54):

> The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that

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[1] The cases referred to are *Shukert* v. *Allen*, 273 U. S. 545; *McCormick* v. *Burnet*, 283 U. S. 784; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; and *Klein* v. *United States*, 283 U. S. 231.

certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death. It follows that the transfer was made in contemplation of death within the meaning of the statute, though decedent was in sound health of body and mind and did not entertain thought of death immediately or in the near future.

SUMMARY OF ARGUMENT

1. Not only the court below but the Board as well treated the question here as one purely of law. The Board's decision rests upon two conclusions of law, (1) that under its interpretation of *United States* v. *Wells*, 283 U. S. 102, the declared motive of the decedent is to be classified as one associated with life, and (2) that the fact that the decedent provided for the accumulation of the income during his lifetime is immaterial.

The burden which rests upon the petitioners to show that the transfer was not made in contemplation of death is not sustained merely by showing that the decedent was not motivated by fear of impending death or by a desire to avoid estate taxes. In order to maintain their challenge it is necessary for them to show affirmatively that the purpose to be subserved was associated with life rather than with death. The Government contends that, in view of the fact that the undisputed evidence shows that the decedent intended by the transfer to make

sure provision for his daughter and her children after his death, the case turns solely upon the classification of the assigned motive. Consequently, if there was error by the court below, it consisted not in reversing a fact finding, but in wrongly classifying the decedent's motive. We submit that the classification made by the court below was correct.

2. The court below rested its decision upon the premise that the decedent's purpose was "to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death," and that this was a purpose associated with death and not with life under the decisions of this Court (R. 54).

There is no basis for the petitioners' contention that the decision below rested solely upon the fact that by the terms of the transfer the income was to be accumulated during the decedent's lifetime. The court looked to the terms of the transfer merely in order to see whether the decedent had carried out his avowed purpose to make sure provision for his daughter and her children after his death. It committed no error in so doing.

3. The petitioners' contention regarding the classification of the decedent's purpose is two-fold:

(a) That "fear of the market" was the "pro
mate" cause for the transfer, the desire to prov
for his daughter and her children after his de
being merely the "contributing" cause (Br.
and incidentally, that the purpose to preserve
property in order to make provision for the obj
of his bounty after death could not have b
achieved by testamentary disposition (Br.
(b) That, in any event, the purpose to provide
the objects of his bounty after death is immate
(Br. 11-47); that "The transfer must be brou
about by fear or thought of death arising f
bodily or mental conditions conducive theret
usually ill health" (Br. 46).

(a) The petitioners give no reason why the c
should separate the motive into its component p
and none for their assertion that fear of the ma
was the proximate cause for the transfer, and
desire to provide for his daughter and her chil
after death merely the contributing cause.
though admitting that the latter desire was on
the causes for the transfer, they fail to recog
that the decedent's purpose to protect his prop
against consequences of possible losses in his
market speculations is merely the connecting
between his fear of the market and his desi
make sure provision for his daughter and her
dren after his death. The elements of the m
are inextricably interwoven. A breakdown o
motive into its component parts is wholly wit

justification. The transfer was a mere substitute *pro tanto* for the disposition he had previously made by will and was made for the same purpose. The mere method of expressing it cannot be the basis for classification. The fact that the preservation of the property during his life, in order to assure certain provision for the objects of bounty at death, could not have been achieved by testamentary disposition does not affect either the character or quality of the controlling purpose. The transfer was merely a means of assuring the accomplishment of that purpose and the very fact that it was used demonstrates the decedent's determination that it should be accomplished.

There is no analogy in this respect between the case at bar and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48. In that case, the Court held that evidence of any motive to provide for children at death was wholly absent, the decedent's only purposes being to make his children independent and to avoid high surtaxes during his lifetime, whereas in this case the avowed purpose of providing for the daughter and grandchildren at his death is admittedly present. The cases are similar only in the circumstance that the appellate court in the *Becker* case, having found no evidence to sustain the finding of the District Court treated the question as a matter of law and reversed the decision of the District Court. Here, likewise, the Circuit Court of Appeals, having found, under the correct

interpretation of the *Wells* case, no evidence to sustain the decision of the Board, treated the question as a matter of law and reversed the Board.

(b) The contention that a purpose to provide for objects of bounty at death is not a death purpose appears to us to run counter to the principles announced by this Court. The petitioners suggest no other motive which is testamentary in character or of a "sort which leads to testamentary disposition," except "fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health" (Br. 46), and the purpose to avoid estate taxes (Br. 10).

Nor is there any analogy here between the case at bar and the *Becker* case. There is an obvious difference between a purpose to make children independent during the donor's lifetime or a purpose to avoid high surtaxes and a purpose to provide for children at death. But there is no substantial difference between a purpose to provide for objects of bounty at death and a purpose to conserve property against casualty in order to insure the effectiveness of such provision. The latter merely indicates a more careful and detailed consideration of the practical methods necessary to achieve an effective provision for the children. It indicates a fixed determination to accomplish it.

The decedent's impelling, controlling, inducing, actuating, dominating motive for the transfer was to provide for his daughter and her children after

his death. That was the reason, and the only reason, for conserving the property. The transfer was a substitute pro tanto for the will he had previously made. He made the substitution without awaiting death because to have awaited death might have defeated his purpose. Hence the transfer was motivated by the same considerations which lead to testamentary disposition—the motive therefor was of a sort which leads to testamentary disposition. This purpose is not obscured by the fact that the method of accomplishing it permitted the decedent during his latter years to indulge in security speculation without concern that misfortune in such ventures might leave his daughter and grandchildren unprovided for after his death.

ARGUMENT

THERE WAS NO EVIDENCE TO SUSTAIN THE BOARD OF TAX APPEALS IN REVERSING THE COMMISSIONER'S DETERMINATION THAT THE DECEDENT'S IRREVOCABLE TRANSFER, EFFECTED BY DECLARATION OF TRUST DATED JANUARY 7, 1927, WAS MADE IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF SECTION 302 (c) OF THE REVENUE ACT OF 1926, AS AMENDED

The petitioners make three contentions. We state them in the order in which we shall discuss them. (1) That the court below overturned a determination of fact made by the Board that the transfer in question was not made in contempla-

tion of death (Br. 16–19); (2) that the court below erred in holding an irrevocable trust to be in contemplation of death as a matter of law, even though it contained no reservation of income to the donor, merely because it provided for an accumulation of income until after the donor's death, thereby preventing the beneficiaries from receiving it until that time; (3) that the court below erred in holding that the decedent's purpose to preserve the property from danger of his intended stock market speculations, in order to be certain that his daughter and her children should be provided for after his death, was "testamentary" and in contemplation of death (Br. 44–47).

(1) *The court below did not overturn a determination of fact made by the Board*

The petitioners' first contention is that the conclusion of the Board that the transfer in question was not made in contemplation of death was one of fact and that the court below improperly reversed it. Hence we have stated the question to be whether there was any evidence to sustain the Board in reversing the Commissioner's determination that the transfer was made in contemplation of death. It might otherwise be stated to be: Whether the Board applied the proper rule of law to the undisputed facts; that is, whether it correctly interpreted the decisions of this Court, particularly that in the case of *United States* v. *Wells*,

283 U. S. 102, and correctly applies its principles to the stipulated facts of this case.

It will be noted that not only the court below, but the Board as well, treated the question as one purely of law. The Board made no special findings. Unless its statement of the formal facts regarding the decedent's age and health and the dates of the execution of the will, the trust in question, and his death are to be regarded as formal findings, it made no findings of fact whatever. It made no finding as to motive, but only related the discussions the decedent had had with the trust officer of the petitioner Colorado National Bank of Denver and the statement he had made to his son-in-law in regard to the purposes of the trust. The Board did not even find (except inferentially) that the transfer was not made in fear of impending death, or that it was not made to avoid the tax. Indeed, in arriving at its conclusion that the transfer was not made in contemplation of death, it contented itself with stating the contentions of the parties and disposing of them by its conclusions that (R. 28):

> We think the transfer was not made in contemplation of death within the meaning of the statute as explained in *United States* v. *Wells*, 283 U. S. 102.

and that—

> Principles announced in the cases above listed control this case which is not distin-

> guishable from one or more of those cases where, as here, income was to be accumulated until after the death of the donor. Therefore, on this point we hold for the petitioners.[*]

It therefore seems clear that the Board's decision rests upon two conclusions of law, first, that under its interpretation of the *Wells* case, the motive of the decedent is to be classified as one associated with life, and second, that the fact that the decedent provided for the accumulation of the income until after his death is immaterial.

The petitioners seek to buttress their contention that the Board decided a question of fact upon which its decision is conclusive by pointing out that, though the decedent was eighty years of age when he made the transfer, he was in good health and, generally speaking, contemplated activities evidencing an expectancy of continued life. They also advert to the fact that there is no claim or evidence that the transfer was made in order to avoid estate taxes. But, as this Court pointed out in the *Wells* case, the statutory concept "transfers made in contemplation of death" is not to be restricted to those induced by a condition causing expectation of death in the near future, and expectation of imminent death is not the final criterion. In the language of the Court (p. 118):

[*] The cases referred to are cited in footnote 1, *supra*, p. 9.

> The words "in contemplation of death" mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand."

We submit that the same principle applies to the purpose to avoid the tax. While there can be no question, we think, that a transfer made for the purpose of avoiding the tax is made in contemplation of death, this also is not the final criterion. Indeed, there was no contention made below, and there is no contention made here, that the transfer was made either in fear of impending death or for the purpose of avoiding the tax. It may be conceded that it was for neither purpose. But a mere showing that neither of these motives was present does not satisfy the burden resting upon the petitioners to show that it was not made in contemplation of death. We submit that under the principles laid down in the *Wells* case, it is necessary in all cases for the decedent's representatives to show that the moving cause for the transfer, and the purpose to be subserved thereby, were associated with life and not with death. The respondent's contention below was, and it is here, that

the petitioners have failed to sustain that burden; that inasmuch as the stipulated evidence shows the purpose to provide for the daughter and her children after the decedent's death the petitioners have failed to show the administrative determination to be in error, and that consequently this case turns solely upon the legal classification of the decedent's motive. Obviously both the Board and the majority of the court below considered the question one solely of law. Nor is the dissent in the court below based upon a different ground. The dissent states (R. 35) that the transfer was made "In order that he might speculate upon the stock market for the remainder of his life more actively than he had in the past without fear that the part of his fortune thus given might be lost," and that the decedent manifested no other intent and purpose in that respect. But this statement merely fails to recognize the legal significance under the *Welle* case of the decedent's avowed purpose to provide for his daughter and her children after his death. Surely if the Board had found the motive to have been merely the limited one stated by the dissenting judge, the respondent would have had just cause to complain that the finding was contrary to the undisputed evidence. We submit that this case may not properly be disposed of on any view of the evidence which fails to give effect to the avowed purpose of the decedent in its entirety.

hatever error the court below may have com-
ed, it did not reverse a finding of fact. If the
t below committed error, it lies solely in the
rpretation which it placed upon the decisions
his Court in the cases above cited, and particu-
y the interpretation which it placed upon the
ision in the *Wells* case. None of the cases cited
the petitioners (Br. 16–19) is to the contrary.'

Of the cases cited and relied upon by the petitioners in
port of their contention only *McCaughn* v. *Real Estate*
, 297 U. S. 606, need detain us. The Court there said
t the ultimate question for decision by the trial court in
ury-waived case was one of fact and its general verdict
conclusive, and that the verdict in question was reached
a result of the trial court's conclusion, that although the
nsfer was not made "under any consciousness or belief or
prehension that death was imminent," "the plaintiffs have
led to show that the motive that induced this transfer,
atever it was, was of the sort which leads to testamentary
position, and, consequently have failed to meet the burden
proof placed upon them by the statute" (p. 607). The mo-
e which the plaintiffs assigned for the transfer was the de-
dent's purpose to conserve the principal of the estate for
s children. If the establishment of this motive was not
fficient to overcome the presumption nothing disclosed by
e evidence in that case would have done so, for (as here)
ere was not a single circumstance that did not support the
resumption. Thus in ultimate analysis, the decisive factor
that case was the classification of the motive. However,
nce the decision of the trial court was in the Government's
avor, it sufficed in the circumstances to base the reversal of
he Circuit Court of Appeals upon the ground that there
as evidence before the trial court to sustain the finding.

(Footnote continued on next page.)

We turn then to a consideration of the petitioners' next contention, that the court below erred in holding an irrevocable trust with no reservation of income to the donor to be, as a matter of law, a disposition in contemplation of death merely because it prevents the beneficiaries from receiving the income during the donor's lifetime by providing for an accumulation of income until the donor's death. Our answer is that this is not the basis of the lower court's decision. We think it clear that the basis of the decision is that the undisputed evidence shows the decedent's avowed purpose to have been to provide for his daughter and her children at or after his death by means of a present transfer which placed a part of his property in a situation where it could not be affected by his speculations, and that this is a purpose associated with death within the meaning of the *Wells* case. The court below looked to the trust merely to see whether the decedent had actually carried out that purpose. The second point in argument is therefore stated in these terms.

It was not necessary for the Court to delve deeper into the case in order to ascertain whether the evidence would have sustained a contrary finding. It would have been necessary to do so only if the trial court had found in favor of the plaintiffs. We believe that in such case a reversal would have been required for there was no evidence to sustain such a finding. However, since the Court found it unnecessary to consider that question in the *McCaughn* case, that case is clearly not controlling here.

(2) *The basis of the court's decision is that the undisputed evidence shows the decedent avowedly was motivated in making the trust by a purpose to provide for his daughter and her children at or after his death and that such motive is one associated with death within the meaning of the Wells case.*

The opinion of the court below discloses that the court rested its decision upon the premise that under the *Wells* case, as well as under the decisions of this Court in *Heiner* v. *Donnan*, 285 U. S. 312, and *Becker* v. *St. Louis Union Trust Co.*, *supra*, and the decision of the Circuit Court of Appeals for the Eighth Circuit in *Willcuts* v. *Stoltze*, 73 F. (2d) 868, and that of the Circuit Court of Appeals for the Fifth Circuit in *Igleheart* v. *Commissioner*, 77 F. (2d) 704 (R. 53), the decedent's motive was associated with death. The court below said (R. 52–53):

> The test lies in the motive for the transfer. If the generating source of the motive is associated with life, the transfer is not made in contemplation of death. But if the generating inducement is associated with death, either immediate or distant, the transfer is made in such contemplation. A gift is made in contemplation of death where the dominant motive of the donor is to make proper provision for the object of his bounty after the death of the donor. Stated, otherwise, it is sufficient to support the tax if the

transfer is motivated by the same considerations as those which prompt testamentary disposition of property without awaiting death.

The court then turned to the decedent's declarations of purposes made to the trust officer of the petitioner Colorado National Bank of Denver. He had said that he desired to make the transfer in the interests of his daughter and her children so that they would be provided for whatever might happen to his financial affairs in the future. He had requested that the instrument should be so worded that whatever might happen to him financially in respect of his reserved property, provision would be made for his daughter and her heirs. The court also adverted to discussions of the decedent and the trust officer as to the kind of provisions which should be included in the instrument to protect his securities, and yet provide for his daughter and her children, and to the statement which the decedent made to his son-in-law that, regardless of his operations on the stock exchange, in the event of his death, his daughter and grandchildren would be adequately provided for through the trust which had been established. The court pointed out that the trust instrument was not designed to provide for his daughter and her children during his lifetime; that under its provisions, none of the property nor the increment thereto was to reach them until after his death,

rther that it was not designed to enable him
gage in speculation; that he could have done
nfettered and unrestricted without the estab-
ent of the trust.

e court then stated, in its own language, what
decedent's avowed motive was. It said (R.

> The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer.

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n that the decision of the lower court rests solely
on the fact that by the terms of the transfer the
come was to be accumulated during the deced-
t's lifetime and added to the corpus. It would
em rather that the court looked to the terms of
e transfer merely to see whether the decedent
d carried out his avowed purpose.

There is no basis for the contention that the court below should not in these circumstances have looked to the trust. Surely the dicta in *Shukert* v. *Allen*, *supra*, *May* v. *Heiner*, 281 U. S. 238, and *Reinecke* v. *Northern Trust Co.*, *supra*, do not lay down such a doctrine. Nor does the decision in *Becker* v. *St. Louis Union Trust Co.*, *supra*. The effect of these dicta and decision is merely that the fact the transfer contained provisions for the distribution of the property at or after death is not alone sufficient to show that the actuating purpose for the transfer was to provide for the objects of bounty at death, and the disposition, consequently, in contemplation of death. In *Shukert* v. *Allen*, *May* v. *Heiner*, and *Reinecke* v. *Northern Trust Co.*, the motives did not appear at all. No contention was made in those cases that the transfer was in contemplation of death. In the *Becker* case, the Court said that two life purposes were shown to have motivated the decedent: (1) To make his children independent during his lifetime, and (2) to avoid high surtaxes on his income. The Court stated the provisions of the trust, doubtless to demonstrate that it was so drawn as actually to accomplish those purposes. If the trust had not been so drawn, but had provided instead, as in this case, for the accumulation of the income during the decedent's lifetime for the benefit of the beneficiaries after his death, the Court could hardly have held, as it did, that there was no

vidence to conflict with the finding that the hought of death was wholly lacking. We submit hat these cases do not hold either expressly or by mplication that the provisions of the trust have no ignificance whatever in determining the legal uality of the intention.

It seems beyond dispute that the basis of the decision of the court below is that the undisputed evidence disclosed the decedent's avowed motive to have been to accomplish his purpose to provide for his daughter and her children after his death, that such a motive is associated with death. By the same token, the decision below does not rest merely upon the narrow ground that the decedent had provided for the accumulation of the income during his lifetime.

This brings us to the petitioners' third and last point, that the decedent's avowed purpose was one associated with life.

(3) *The transfer was motivated by a death purpose*

The petitioners' contention regarding the classification of the decedent's purpose is two-fold: (a) That "fear of the market" was the "proximate" cause for the transfer, and the desire to provide for his daughter and her children after his death merely the "contributing" cause (Br. 47); and incidentally, that such "contributing" purpose could not have been achieved by testamentary disposition (Br. 11). (b) That, in any event, the purpose to provide for the objects of his bounty after death

is immaterial (Br. 11–47); that to bring the transfer within the statute it must appear that it was "brought about by fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health." (Br. 46.)

(a) The first of these contentions appears to be the primary basis for the petitioners' assertion that "The gift was clearly in contemplation of the dangers of speculation and not in contemplation of death," (Br. 10) and that "His motive of avoiding loss in the stock market was one definitely associated with life and clearly indicates a definite concern connected with his future activities" (Br. 47). An attempt is made to buttress this first contention by pointing out incidentally that the preservation of the decedent's property in order to make provision for the objects of his bounty after death could not have been achieved by a testamentary disposition (Br. 11, 45).

The petitioners state no justification for separating the motive into its component parts, and none for the assertion that fear of the market was the proximate and the desire to provide for his daughter and her children after death merely the contributing cause for the transfer.[4] The petitioners' argument ignores the evident connection between the decedent's fear of the market and his

[4] It is to be observed that although the petitioners admit the existence of the purpose to provide for the objects of the decedent's bounty at death, the dissent in the court below entirely ignores it.

desire to provide for the objects of his bounty after death. It is obvious from the entire transaction that his purpose in protecting his property against the hazards of his intended speculation in securities was merely an incident in the accomplishment of his purpose to make sure provision for his daughter and her children after his death.

We have here but a single motive, to provide for his daughter and her children, not during the remainder of his life, but after his death, and despite any possible adverse turn of his fortune. The elements of this motive are inextricably interwoven. Any effort to break it down into its component parts is wholly without justification. There is no evidence upon the basis of which such breakdown is justified and the petitioners suggest no reasons for doing so.

The situation disclosed by the undisputed evidence is that the decedent had made a will by the terms of which he had devised and bequeathed all of his property to the petitioners in trust for the benefit of his daughter and her children upon substantially the same terms as those of the trust here in question. His determination thereafter to speculate more freely caused him to consider the effect such speculation might have upon the provisions he had theretofore made for them by his will and to realise that such provisions might not be adequate to carry out the purpose of his will and that it would be necessary, if he were to be certain to accomplish that purpose, to

find a different and safer method of doing so. This review of the situation in the light of his intended speculation led him to a determination to make an immediate transfer in trust of a portion of his property. Clearly such transfer was a substitute *pro tanto* for the disposition he had theretofore made by his will. It was made in place and stead of some of the will's provisions and the purpose which induced it was precisely the same purpose which had led him originally to make the testamentary disposition. It seems to us that it can make no difference whether we say that the decedent's purpose was to protect his property against the vicissitudes of speculation in order to insure provision for the objects of his bounty after death, or that his purpose was to make provision for them after his death by so arranging his present transfer as to insure that the provision made for them could not be affected by such speculation. Surely the manner of expressing the purpose cannot be made the basis for classification. It seems abundantly clear that the ultimate purpose of the transfer was to make such provision. There is nothing whatsoever in the evidence to show that if it had not been for that purpose, the decedent would have made the transfer at all. It cannot be said upon the basis of any evidence in the case that the decedent intended to make provisions for the objects of his bounty during his lifetime. If that had been his purpose, he could and would have made outright gifts to them, or would have made

provisions for the payment of the income to them during his lifetime, or otherwise made that purpose effective. The transfer he made makes absolutely no provision for them during his lifetime.

But the petitioners assert that the purpose to protect the decedent's property, "in order [as the court below said] to make certain that it would be used for his daughter and her children after his death," could not be achieved by a testamentary disposition (Br. 11); that "It [the Government] admits that the gift accomplished something that could not be accomplished by will, and that that something was the motive causing the transfer at the time it was made." (Br. 45.)

Presumably the petitioners intend to imply that no transfer can be a substitute for a testamentary disposition if it subserves some purpose which cannot be accomplished by a will. We submit that there is no merit in such a contention. The mere fact that a will alone is inadequate to assure the accomplishment of its purposes does not lead to the conclusion that a substitute instrument, designed to make certain by more surely effective means that such purposes shall be accomplished, is not motivated by the same purposes. Obviously it is. If there were any merit in the petitioner's contention, no *inter vivos* transfer could ever be a substitute for a will, for in the very nature of things every such transfer subserves some purpose which a testamentary disposition could not possibly subserve. No

one would contend that a gift *causa mortis* is not made in contemplation of death, and yet the full purposes of such a gift obviously could not be served by a will. See *Basket* v. *Hassell*, 107 U. S. 602, cited in *United States* v. *Wells*, *supra*, at p. 116. Nor do the petitioners question that a transfer made in order to avoid the tax falls within the provisions of the statute, for they repeatedly insist that the transfer here was not made for that purpose (Br. 4, 10, 47); to the contrary, they contend that a purpose to avoid the estate tax is a criterion for the imposition of that tax (Br. 13). And yet, a testamentary disposition obviously can not subserve that purpose.

The petitioners rely upon the *Becker* case. They contend (Br. 27) that there is an analogy between the motives in that case and those here. They say that the motives to make children independent and to avoid high surtaxes on the decedent's income in that case are to be compared with the motive here to save a part of his property from loss, and that in both cases a remote motive existed, namely, to provide for the decedent's children at death, evidenced by the provisions of the trusts.

The difficulty with this supposed analogy is that in the *Becker* case the Court said there was an entire absence of evidence to show the motive to provide for children at death, the inference being that the mere provision in the instrument for the devolution of the corpus upon them at his death was not in itself sufficient to show that the decedent

was in any wise motivated by a purpose to provide for them at death. Hence the Court said that the only purposes disclosed were to make his children independent and to avoid surtaxes during his lifetime. It is to be observed in this connection that in stating the supposed analogy, the petitioners wholly fail to state the full purpose of the decedent as declared by him to the trust officer, namely, that he desired to conserve the property only in order that he might provide for his daughter and her children after his death.

We think that this Court would not have sustained a reversal of the judgment of the District Court in the *Becker* case if in that case the decedent had provided for the accumulation of the income during his lifetime and had stated that his motive for making the transfers was to provide for his children after his death, and that the avoidance of surtaxes during his lifetime was sought merely in order to accomplish that purpose more generously.

We submit therefore that the decedent's only purpose in making the transfer in this case, which is disclosed by the undisputed evidence, was to provide for his daughter and her children at or after his death, or, to put it another way, to make sure provision for them after his death.

We turn to the question whether the motive to provide for the objects of bounty at death is immaterial.

(b) The contention that a transfer springing from the purpose to provide for the objects of bounty at death is not made in contemplation of death seems to us to run counter to all of the decisions of this Court, and particularly to that in *Milliken* v. *United States*, 283 U. S. 15, and that in the *Wells* case, *supra*. While in the *Milliken* case the only question was whether Congress had the power to require the inclusion in the gross estate of property transferred in contemplation of death, the basis of decision that it did have such power was that such transfers were mere substitutes for testamentary dispositions. In this connection, the Court said (p. 23):

> It is sufficient for present purposes, that such gifts are motivated by the same *considerations* as lead to testamentary dispositions of property, and made as *substitutes* for such dispositions *without awaiting death*, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. [Italics supplied.]

This case was decided at the same term as the *Wells* case, the decision being rendered only a few days before the *Wells* case was argued. It is relied upon in the *Wells* case, together with *Nichols* v.

Coolidge, 274 U. S. 531, as authority for the proposition that the dominant purpose of Congress was to reach such substitutes, in order to prevent the evasion of estate taxes. Hence in the *Wells* case, the Court said, almost in the same language used by it in the *Milliken* case (p. 117):

> As the transfer may otherwise have all the indicia of a valid *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be *of the sort* which leads to testamentary disposition. [The second italics are supplied.]

We believe there is no difference in the thought which the Court sought to express in the two cases.

But the motive which normally leads to testamentary disposition is the purpose to provide for the objects of bounty at death, and we think there can be no question that this is the motive the Court referred to in both cases. This is the view of the lower Federal courts. See, e. g., *Igleheart* v. *Commissioner, supra; Updike* v. *Commissioner*, 88 F. (2d) 807 (C. C. A. 8th); *Willcuts* v. *Stoltze, supra.* Cf. *Heiner* v. *Donnan, supra*, and *Becker* v. *St. Louis Union Trust Co., supra.* If we are correct in this, then a transfer which is motivated by that purpose is obviously made in contemplation of death within the meaning of the statute.

Nevertheless, the petitioners contend it is immaterial that the transfer here springs from a pur-

pose to provide for objects of bounty at dea
The basis of the contention seems to be that a
motive is common to all men irrespective of
or health, and the petitioners ask the Court to c
clude from this fact, without more, that in holdi
the transfer here to have been made in contemp
tion of death, the court below confused contemp
tion of death with the expectation of death comm
to all men. (Br. 9, 12).

This contention flies in the teeth of the *Wells* a
Milliken cases. Its fallacy lies in the fact that
assumes that this motive is always present as
motivating factor, because it is one common to
men. This, of course, is not so; it may or may n
be present as an actively motivating factor in
given instance. In the case at bar, it not only w
present, but was the motive without which t
transfer would not have been made. As has a
ready been pointed out, the evidence complete
fails even to suggest that the transfer would hav
been made except for that purpose. This, alon
we submit, is sufficient to bring the transfer withi
the statute.

We have already pointed out also that ther
is here a definite and inseparable connectio
between the decedent's purpose "to save a par
of his fortune from loss in the stock market,
as the petitioners put it (Br. 27), and the purpos
to provide for the decedent's daughter and he
children after his death. The former is entirely de
pendent upon the latter. By placing a part of hi

property in "an asylum of immunity from adverse consequences of speculation," as the court below said (R. 54), the decedent merely implemented his purpose to provide for his daughter and her children after his death. Consequently there is no analogy on this point between the case at bar and the *Becker* case, for there is no connection between the purpose in that case to make children independent or one to avoid high surtaxes and the purpose in this case to provide for them at death. The Court found no evidence of the latter motive in the *Becker* case. Here its existence is shown by undisputed evidence. In short, there is no difference, either in character or quality between a purpose to make provision for objects of bounty at death and a purpose, expressed in the instrument which provides for the objects of bounty, to conserve property against casualty in order to insure that the provision will be effective.

We submit therefore that the decedent's impelling, controlling, inducing, actuating, dominating motive for the transfer was to provide for his daughter and her children at or after his death; that this was the immediate and moving cause for the transfer for it was the reason, and the only reason, for conserving the property—for placing it in an asylum of immunity so that it could in no wise be affected by any adverse results of the decedent's intended speculations. In every sense this transfer was a substitute *pro tanto* for the will that the decedent had theretofore made. He made

such substitute without awaiting death because he realised that to have awaited death might have permitted the defeat of the purpose. Hence we think it abundantly clear that the motive or purpose was one associated with death and not with life within the meaning of both the *Milliken* and the *Wells* cases. In the language of the *Milliken* case (p. 23), it was of the kind of dispositions which are "motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective"; and, in the language of the *Wells* case (p. 117), it was "of the sort which leads to testamentary disposition."

The petitioners' contention that the motive to provide for objects of bounty at death is immaterial has left them no choice but to contend that, in order to bring an *inter vivos* transfer within the purview of the statute (Br. 46),

> The transfer must be brought about by fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health.

The petitioners make substantially the same contention here and there throughout their brief. (Br. 8, 9, 11, 12, 13, 38.) The contention is predicated solely upon language contained in estate tax regulations promulgated before the decision in the *Wells* case, under the Revenue Acts of 1918, 1921, 1924,

and 1926, namely, 37, 63, 68, and 70, to the effect that a transfer is made in contemplation of death "wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty."[1] But it is clear that these regulations did not confine the definition of contemplation of death to such expectation. Nothing in the *Wells* case justifies that conclusion. It is to be noted that the Court there had before it the applicable provisions of Regulations 37 and cited them in full in note 12 in support of the text on p. 115. Furthermore, *McCaughn* v. *Real Estate Co.*, 297 U. S. 606, 607, could not have been decided as it was if the thought of death arising from bodily or mental conditions conducive thereto had been the final criterion of taxability.

In these circumstances, we submit the argument of the petitioners is pointless that "It is too late for the Department or the courts to make a new and different definition," because the administra-

[1] Regulations 80, promulgated after the decision in the *Wells* case, substitutes for this, language taken from the *Wells* case to the effect that the phrase "contemplation of death" as used in the statute is not limited to a contemplation of imminent death or to an apprehension that death is near at hand; that death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition; that a gift *inter vivos* which springs from a motive essentially associated with life rather than with death is not made in contemplation of death. (Appendix, *infra*, p. 43.)

[illegible] definition of contemplation of death contained therein is asserted to have been "approved by repeated congressional enactments of the law and by this court." (Br. 6-8.) The Government does not here seek a new definition of contemplation of death. It seeks simply to apply to the undisputed facts in this case the definition given by this Court in the *Milliken* and *Wells* cases.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *. (U. S. C., Title 26, Section 411.)

Pub. Res. No. 131, approved March 3, 1931, c. 454, 46 Stat. 1516:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income

from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth." (U. S. C., Title 26, Sec. 411.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (U. S. C., Title 26, Section 411.)

Treasury Regulations 80 (1934 Ed.):

ART. 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase "contemplation of death" as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

* * * * *

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